

A **OOMAN CHUNG v. DIRECTOR OF LANDS
AND SURVEYS, SABAH & ANOR**

COURT OF APPEAL, PUTRAJAYA

ZAHARAH IBRAHIM JCA

LINTON ALBERT JCA

B ABANG ISKANDAR JCA

[CIVIL APPEAL NO: S-01-105-03-2012]

6 OCTOBER 2015

C **LAND LAW:** *Acquisition of land – Objection against acquisition – Application for judicial review to quash decision to acquire subject lots – Second judicial review application in relation to second acquisition not granted in favour of applicant – Appeal against – Whether purpose of second acquisition similar to first acquisition – Whether involved different exercise of administration action – Whether caught by doctrine of res judicata – Whether acquisition for a public purpose as defined under s. 2 Land Acquisition Ordinance (Sabah) (Cap 69) – Whether declaration contained sufficient particulars as required under s. 3(2) – Whether notice of acquisition contained wrong description of subject lot – Whether complied with s. 7 – Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd*

E **CIVIL PROCEDURE:** *Appeal – New points raised on appeal – Whether leave of court obtained – Whether issue raised considered – Rules of the Court of Appeal 1994, O. 18 r. 2*

F The appellant ('applicant') was the registered proprietor of three pieces of land held under Country Leases No. 07536536, 075385661 and 075365347 ('the subject lots'). The subject lots were the subject of a declaration dated 28 August 2006 under s. 3(2) of the Land Acquisition Ordinance (Sabah) (Cap 69) ('LAO') which was to be acquired ('the first acquisition') for the Palm Oil Industrial Cluster, Sandakan ('POIC Sandakan'). The first acquisition was challenged by way of a judicial review application ('first judicial review') and an order of *certiorari* was granted by the High Court in favour of the applicant ('the first order'). It was held, *inter alia*, that (i) the purpose of the POIC Sandakan did not fall under the definition of public purpose as defined under s. 2 of the LAO; and (ii) there was non-compliance with s. 7(3) of the LAO. There was, however, no appeal against the first order. Instead, the respondent issued a new declaration dated 3 August 2010 ('the new declaration') which was published in the State Gazette on 19 August 2010 and 26 August 2010 under s. 3(2) of the LAO for the POIC Sandakan which stated that the acquisition was for a public purpose. Aggrieved, the applicant commenced judicial review proceedings against the respondents ('second judicial review') to quash the decision to acquire the subject lots. The trial court, however, dismissed the application. Dissatisfied, the applicant appealed to this court. The issues that arose for consideration, *inter*

alia, were (a) whether the doctrine of *res judicata* applied in relation to the second judicial review; (b) whether the acquisition for the purpose of the POIC Sandakan was for a public purpose; (c) whether the notice of acquisition issued under s. 7 of the LAO contained the wrong description for one of the subject lots; and (d) whether the new declaration contained particulars of the subject lots as required under s. 3(2) of the LAO. Further, learned counsel for the applicant submitted an additional ground in relation to the non-compliance with s. 6 of the LAO since there was no negotiation entered into with the applicant for the purchase of the subject lots.

Held (allowing appeal in part)

Per Zaharah Ibrahim JCA delivering the judgment of the court:

- (1) It is settled law that judicial review is concerned with the process of decision making and not with the decision itself. The decision of the learned High Court Judge in the first judicial review dealt only with the procedural aspects of the first acquisition. The second acquisition, however, was a different exercise of administration action, although in relation to the same subject matter. As such, the second judicial review was not caught by the doctrine of *res judicata*. Further, the acquisition of the subject lots for the POIC Sandakan was within the public purpose as defined under s. 2(b) of the LAO (*Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd*; foll). (paras 31, 34, 36 & 43)
- (2) The new declaration indicated that the subject lots were being required for the POIC Sandakan. The locality of the land was stated as being "Sg Labu" which, by virtue of the reference to the Assistant Collector of Land Revenue, Sandakan, and the name of the POIC, could only be in the district of Sandakan. The declaration also stated/showed (i) the title numbers of the subject lots and the respective area of the lots; and (ii) the plan of the area to be acquired which could be inspected at the office of the Director of Lands and Surveys, Kota Kinabalu or at the office of the Assistant Collector of Land Revenue, Sandakan. As such, all the particulars required under s. 3(2) of the LAO were contained in the declaration. (paras 45-47)
- (3) There was non-compliance with s. 7 of the LAO in relation to one of the subject lots. The new declaration described the subject lot having an area of 14.93 acres as being held under Country Lease No. 075365356. However, the notice of acquisition which was issued under s. 7 of the LAO described that lot as being held under Country Lease No. 015081455. As such, there was uncertainty as to which land was acquired and was not in compliance with the requirement under s. 7 of the LAO. The part of the High Court decision in relation to this subject lot which was wrongly described in the notice under s. 7 was set aside. As such, the acquisition in relation to that subject lot was quashed. (paras 48, 49 & 54)

- A (4) The memorandum of appeal did not state about the issue of there being no negotiation under s. 6 of the LAO. Further, no leave was obtained from this court to state the additional ground in relation to the non-compliance with s. 6 of the LAO as required under O. 18 r. 2 of the Rules of the Court of Appeal 1994. Similarly, the issue of non-compliance with s. 6 of the LAO was never raised in the High Court.
- B As such, the issue of non-compliance with s. 6 was not considered. (paras 50-53)

Case(s) referred to:

- Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC (foli)
- C Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 (refd)
- Mengsina Sdn Bhd and Another v. The Government of the State of Sabah and Another (Unreported) (refd)
- Tanjong Jaga Sdn Bhd v. The Minister of Labour and Manpower & Anor [1987] 2 CLJ 119; [1987] CLJ (Rep) 368 SC (refd)

D Legislation referred to:

Land Acquisition Ordinance (Sabah) (Cap 69), ss. 2, 3(2), 6, 7(2), (3), 14
Rules of the Court of Appeal 1994, O. 18 r. 2

For the appellant - Sharatha Masyaroh John Ridwan Lincoln; M/s Voo & Co
For the respondents - Zaleha Rose Pandin (Dayangku Fazidah Hatun Pg Bagun with her)
SSCs; State AG's Chambers

- E [Appeal from High Court Sabah & Sarawak, Sandakan; Judicial Review No: S25-04-2011]

Reported by Kumitha Abd Majid

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JUDGMENT

Zaharah Ibrahim JCA:

Introduction

- G [1] This was an appeal against the decision of the High Court at Sandakan which dismissed the application by the appellant for judicial review of the land acquisition by the respondents of three pieces of land registered in the name of the appellant.

- H [2] The parties are referred to in this judgement as they were in the High Court.

Brief Background Facts

- I [3] The applicant was the registered proprietor of three pieces of land held under Country Leases no. 07536536, 075385661 and 075365347 (collectively referred to in this judgement as the "subject lots").

[4] The subject lots were the subject of a declaration dated 28 August 2006 under sub-s. 3(2) of the Sabah Land Acquisition Ordinance (“LAO”) of land to be acquired for the purpose of the Palm Oil Industrial Cluster, Sandakan (“POIC Sandakan”), and a subsequent notice of acquisition under s. 7 of the LAO (“first acquisition”).

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[5] The first acquisition was challenged by way of a judicial review application (“first judicial review”). An order of *certiorari* was granted by the High Court on 26 March 2010 (“first order”) which held that the purpose of the POIC Sandakan did not fall under the definition of public purpose as defined under s. 2 of the LAO. The High Court also held that there was non-compliance with sub-s. 7(3) of the LAO.

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[6] There was no appeal against the first order.

[7] Instead, the respondents issued a new declaration dated 3 August 2010 (“3 August 2010 declaration”) which was published in the State *Gazette* on 19 August 2010 and again on 26 August 2010 under sub-s. 3(2) of the LAO for the same purpose, namely for the POIC Sandakan (“second acquisition”).

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[8] The applicant, being aggrieved by the second acquisition, commenced judicial review proceedings in the High Court at Sandakan (“second judicial review”) to have the decision to acquire the subject lots quashed.

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In The High Court

[9] Leave for the second judicial review application was granted on 28 June 2011.

Issues Before The High Court

[10] At the substantive hearing of the second judicial review, the issues before the High Court were as follows:

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(a) whether the compulsory acquisition of the subject lots was irrational, in bad faith and with ill intention;

(b) whether the acquisition of the subject lots for the purpose of the POIC Sandakan was for a public purpose;

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(c) as no appeal was filed against the first order, and as the land which was the subject matter of the second acquisition and the purpose of the second acquisition were exactly the same as the first acquisition, whether the second acquisition was caught by the doctrine of *res judicata* and was therefore null and void;

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(d) whether the compensation sum was too low;

(e) whether the 3 August 2010 declaration contained sufficient particulars of the subject lots;

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(f) whether the applicant was personally served with the 3 August 2010 declaration and statutory notices;

- A (g) whether the bank to whom the subject lots were charged (and was therefore an interested person) was served with the notice under sub-s. 7(3) of the LAO.

Findings Of The High Court

- B *Issues Of Irrationality, Bad Faith And Public Purpose*

[11] The learned Judicial Commissioner found that the applicant had failed to prove that the acquisition of the subject lots was irrational, in bad faith and with ill intention.

- C [12] His Lordship also found that the acquisition of the subject lots for the purpose of the POIC Sandakan was for a public purpose within the purview of the LAO.

Issue Of Res Judicata

- D [13] On the issue of *res judicata*, the learned Judicial Commissioner, relying principally on the Federal Court case of *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697, held that *res judicata* did not apply in judicial review cases.

- E [14] The learned Judicial Commissioner made the finding that the High Court in the first judicial review quashed the first acquisition because the learned High Court Judge found that the respondents had failed to produce any evidence to show that the purpose of the POIC Sandakan was a public purpose, and had failed to serve the necessary statutory notice pursuant to sub-s. 7(3) of the LAO. The learned Judicial Commissioner held that the respondents were at liberty to commence fresh compulsory acquisition so long as they complied with the relevant provisions of the LAO.

Issue Of Compensation Being Low

- G [15] The learned Judicial Commissioner held that any grievance on the amount of compensation must be addressed in proceedings brought under s. 14 of the LAO and not in judicial review proceedings.

Issue Of Sufficiency Of Particulars Of The Subject Lots

[16] The learned Judicial Commissioner found that the 3 August 2010 declaration contained sufficient particulars of the subject lots.

- H *Issue Of Personal Service Of The Declaration And Notices*

- I [17] On the issue of whether the applicant was personally served with the 3 August 2010 declaration and the statutory notices, the learned Judicial Commissioner found that efforts had been made to personally serve the documents but the applicant and/or his solicitors were evading service. His Lordship found that the documents were duly served.

Issue Of Service Of Statutory Notice On The Chargee Bank

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[18] The learned Judicial Commissioner found that the bank had in fact been served with the statutory notice and the bank's solicitor was present and held a watching brief for the bank during the hearing at the leave stage.

Decision Of The High Court

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[19] Based on the findings as set out above, the learned Judicial Commissioner dismissed the applicant's application for judicial review.

[20] The applicant appealed to this court against that dismissal.

In The Court Of Appeal

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[21] The applicant appealed to this court from the judgment of the learned Judicial Commissioner on several grounds as set out in 23 paragraphs in the memorandum of appeal.

[22] However, in her written submissions learned counsel for the applicant only dealt with the following grounds:

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- (i) that the doctrine of *res judicata* applied in relation to the second judicial review;
- (ii) that the acquisition for the purpose of the POIC Sandakan was not for a public purpose;
- (iii) that the notice of acquisition issued under s. 7 of the LAO contained the wrong description of one of the subject lots and therefore did not comply with s. 7 of the LAO; and
- (iv) that the 3 August 2010 declaration did not contain the particulars of the subject lots as required by sub-s. 3(2) of the LAO.

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[23] We therefore deemed the other grounds in the memorandum of appeal to have been abandoned.

[24] In her written submissions as well as oral submissions before us, learned counsel for the applicant also submitted an additional ground with regard to non-compliance with s. 6 of the LAO.

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[25] It was submitted that as there was no negotiation entered into with the applicant for the purchase of the subject lots as required by s. 6 of the LAO before the subject lots were formally acquired, the acquisition was improper.

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Analysis*Issue Of Res Judicata*

[26] The issue of *res judicata* in relation to the second acquisition was the central issue in the High Court in this case.

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- A [27] The learned Judicial Commissioner in his judgement stated that in the first judicial review one of the two main grounds for quashing the first acquisition was the learned High Court Judge's finding that there was no evidence to show that acquisition for the purpose of the POIC Sandakan was for a public purpose.
- B [28] We had referred to the judgement of the learned High Court Judge in the first judicial review and found the following finding:
- C 33. To my mind, until it can be shown that the development of Oil Palm Industrial Cluster is for general public purpose, the Respondents cannot rely on the conclusive provision provided in Section 3 of the Sabah Acquisition Ordinance. There is not an iota of evidence as to how the Oil Palm Industrial Cluster will serve the general interest of the public.
- [29] That finding was the reason for the learned High Court Judge in the first judicial review holding that the first acquisition was not in accordance with s. 3 read with the definition of "public purpose" in s. 2 of the LAO.
- D [30] Apart from that issue of evidence, the first acquisition was also quashed for non-compliance with the provisions of sub-ss. 7(2) and 7(3) of the LAO in relation to service of the notice of acquisition.
- E [31] There was no doubt in our minds that the decision of the learned High Court Judge in the first judicial review dealt only with the procedural aspects of the first acquisition.
- [32] The learned Judicial Commissioner, as mentioned above, had relied on the decision of the Federal Court in *Akitek Tenggara (supra)* and held that the doctrine of *res judicata* did not apply in judicial review proceedings.
- F [33] Learned counsel for the applicant submitted that the case of *Akitek Tenggara (supra)* was not applicable to this case as that case involved a decision of a tribunal that was not a final decision.
- G [34] We were of the considered view that the case of *Akitek Tenggara (supra)* was applicable to this case. In that case, Augustine Paul, FCJ, referring to *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 and quoting Abdoolcader, SCJ, in *Tanjong Jaga Sdn Bhd v. The Minister of Labour and Manpower & Anor* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368; [1987] 1 MLJ 124, said:
- H It is settled law that judicial review is concerned with the process of decision making and not with the decision itself.
- [35] His Lordship Augustine Paul FCJ also quoted with approval the following passage by MP Jain in his book *Administrative Law of Malaysia and Singapore* (3rd edn):
- I A review court does not substitute its own decision for that of the original decision making body. A review court can only grant one or more of the specific remedies, eg an order quashing the decision of the decision-

making body. Many a time, therefore, judicial review is superficial and marginal and does not attack the heart of the problem, *viz* whether the administrative decision is right or wrong in the circumstances of the case.

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[36] The first judicial review was concerned with the first acquisition. The case before us was in relation to the second acquisition - a different exercise of administrative action, although in relation to the same subject matter. In our considered opinion, the second judicial review was not therefore caught by the doctrine of *res judicata*.

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Issue Of The Second Acquisition Not Being For A Public Purpose

[37] The 3 August 2010 declaration as published in the *State Gazette* on 19 August 2010 and published again in the *State Gazette* on 26 August 2010 stated that the acquisition was “for a public purpose, that is to say, for the setting up of an integrated palm oil industrial cluster known as Palm Oil Industrial Cluster, Sandakan”.

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[38] Unlike the first judicial review, in the second judicial review the High Court had before it the affidavit of one Mr. Wong Khoi Ping @ Thomas Wong, who was an officer in the Ministry of Industrial Development Sabah and who produced his sworn witness statement and documents in an earlier case, being Suit No. S. 2109-2007 (*Mengsina Sdn Bhd and Another v. The Government of the State of Sabah and Another*) as part of his affidavit testimony in this case. In *Mengsina (supra)*, this witness had testified and explained “what the Palm Oil Industrial Cluster (POIC, Sandakan) is all about”.

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[39] In his witness statement, Mr. Wong explained that the POIC Sandakan “aims to spearhead palm oil downstream processing so as to add value to the oil palm sector, creates jobs and business opportunities. Aside from investments directly link to palm oil, the POIC Sandakan offer opportunities to a wide range to supporting industries needed for the palm oil sector (sic)”.

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[40] According to Mr. Wong in his witness statement, the POIC Sandakan was part of the State Government’s initiatives to expedite the process of industrialisation in the manufacturing sector through higher value added activities. Mr Wong further stated in his witness statement that the State Government aimed, through the POIC Sandakan project, to create a spin-off for business opportunities and entrepreneurship and ultimately provide jobs and improve the standard of living and infrastructure. The Federal Government had allocated funds amounting to RM200 million, according to Mr. Wong, for the development of the internal infrastructure in the POIC Sandakan, which was one of five similar POICs being developed throughout Malaysia.

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[41] Section 2 of the LAO defines “public purpose” as follows:

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“public purpose” means any, or any combination, of the following purposes -

- A (a) for exclusive use of the Government or of the Federal Government or for general public use;
- (b) for or in connection with the planning, establishment, **extension, improvement or development of any town or township any purpose reasonably necessary or desirable in regard thereto, including** the provision of open spaces and amenities and **the setting apart of suitable sites for factories industries and trade;** (emphasis added)
- B (c) for or in connection with the provision of residential accommodation for any section or class of the community including the officers, servants or employees of the Government or the Federal Government, and the families and employees thereof;
- C (d) for obtaining control over land contiguous to, or required for or in connection with, any port, airport, railway, road or other public works of convenience;
- (e) for or in connection with any public utility undertaking or the provision of any public service;
- D (f) for or in connection with any scheme relating to the settlement or resettlement of any community, or of any section or class of the public, rural or urban;
- (g) for or in connection with the provision of land for the cultivation of padi, or for agricultural research or experimental purposes;
- E (h) for or in connection with the conservation, improvement or exploitation of natural resources.

F [42] We noted that in the first judicial review proceedings, the applicant's position was that as far back as 1995 the area in which the subject lots were located was classified as "Special Industrial Zone IN(S)" and that most of the neighbouring lands had been developed for industrial purposes. In other words, the establishment of the POIC Sandakan was consistent with the overall development in that area.

G [43] We therefore agreed with the learned Judicial Commissioner that the acquisition of the subject lots for the POIC Sandakan would be within the public purpose as defined in para. (b) of the definition of that term in s. 2 of the LAO.

H Issue Of The 3 August 2010 Declaration Not Complying With Sub-s. 3(2) And S. 7 Of The LAO

[44] Subsection 3(2) of the LAO contains the requirement that the declaration that any land was required for a public purpose must contain the following particulars:

- I (a) the district in which the land is situate;
- (b) a description of the land, giving the approximate area and such other particulars as are necessary to identify the land;

- (c) in cases where a plan has been prepared, the place where, and the time when, a plan of the land can be inspected; A
- (d) the public purpose for which the land is required.

[45] The 3 August 2010 declaration which was published in the *State Gazette* on 19 August 2010 and again on 26 August 2010 (the two publications being a requirement of sub-s. 3(2) of the LAO) clearly indicated that the subject lots were being required for the POIC Sandakan. The locality of the land was stated as being “Sg. Labu” which, by virtue of the reference to the Assistant Collector of Land Revenue, Sandakan, and the name of the POIC, could only be in the district of Sandakan. B

[46] The 3 August 2010 declaration also stated the title numbers of the subject lots and the respective area of the lots. It also stated that the plan showing the area to be acquired was Plan No. 07125893 which could be inspected at the office of the Director of Lands and Surveys, Kota Kinabalu or the office of the Assistant Collector of Land Revenue, Sandakan, during office hours. C D

[47] There was no doubt that all the particulars required by sub-s. 3(2) to be contained in the 3 August 2010 declaration were in fact in the declaration. We were satisfied that the learned Judicial Commissioner did not err when His Lordship found that the 3 August 2010 declaration contained all the required particulars. E

[48] However, we agreed with the applicant that there was non-compliance with s. 7 of the LAO in relation to one of the subject lots.

[49] The 3 August 2010 declaration published under sub-s. 3(2) of the LAO described the subject lot having an area of 14.93 acres as being held under Country Lease No. 075365356. However, the notice of acquisition dated 1 September 2010 which was issued under s. 7 of the LAO (and which was required by that section to contain the particulars of the land as included in the declaration under sub-s. 3(2) of the LAO), described that lot as being held under Country Lease No. 015081455. There was clearly uncertainty as to which land was acquired. This was clearly not in compliance with the requirement of s. 7 of the LAO. F G

Issue Of Non-compliance With S. 6 Of The LAO

[50] We had carefully examined each and every one of the 23 paragraphs in the applicant’s memorandum of appeal and found that in none of them was the issue of there being no negotiation under s. 6 of the LAO raised. H

[51] There was also no leave obtained from this court as required under O. 18 r. 2 of the Rules of the Court of Appeal 1994 to put forward that additional ground of non-compliance with s. 6 of the LAO. I

A [52] We had also examined each and every affidavit filed by the applicant in the High Court, the notes of proceedings in the High Court, and the written submissions for the applicant in the High Court. We noted that the issue of non-compliance with s. 6 of the LAO was never raised in the High Court. That explained the absence of any reference to this issue in the judgement of the learned Judicial Commissioner.

B [53] In those circumstances we were of the considered view that the issue of non-compliance with s. 6 of the LAO was not an issue that we needed to consider.

C **Decision**

[54] Based upon our analysis as set out above, we allowed the appeal in part. That part of the decision of the High Court in relation to the subject lot having an area of 14.93 acres which was wrongly described in the notice under s. 7 of the LAO was set aside.

D [55] The acquisition in respect of that subject lot was quashed. The rest of the High Court order was affirmed. We made no order as to costs and ordered the deposit to be refunded to the applicant.

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